National Labor Relations Board Weekly Summary of

NLRB Cases

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October 2, 2009 W-3228

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Alan Ritchey, Inc. (32-CA-18149, et al.; 354 NLRB No. 79) Richmond, CA, Sept. 25, 2009. The Board adopted the administrative law judge's findings that the Respondent committed numerous violations of Section 8(a)(5) of the Act, by bargaining in bad faith, dealing directly with employees and making numerous unilateral changes. However, the Board modified some of the judge's findings concerning the Respondent's unilateral changes. First, the Board agreed with the judge that the Respondent unlawfully refused to bargain with the Union over the effects of its unilateral reduction of the number of nonworking holidays. As to the decision, the Board found that the decision itself was not subject to bargaining and reversed the judge's finding of a violation. Second, the Board agreed with the judge that the Respondent's promulgation of a no-union-talk rule violated Section 8(a)(5). The Board also found that the rule independently violated Section 8(a)(1), but reversed the judge's finding that the rule also violated Section 8(a)(3). The Board noted the absence of evidence that the Respondent had disciplined any employee pursuant to the rule. Third, the Board reversed the judge's finding concerning the Respondent's changes in welder Kevin Lynch's work assignments. The Board noted that the assignments were consistent with past practice. [HTML] [PDF]

The Board reversed the judge's finding that the Respondent violated Section 8(a)(5) by failing to notify the Union and afford it an opportunity to bargain before disciplining inspectors for failing to meet minimum efficiency standards, disciplining employees for absenteeism, and discharging certain employees. The judge held that an employer's exercise of some discretion in meting out discipline imposed a duty on the employer to engage in predisciplinary bargaining, provided the Union has demanded it. The judge found the violation since the Union sought predisciplinary bargaining and the Respondent refused. The judge relied on Washoe Medical Center, Inc., 337 NLRB 202, 202 fn. 1 (2001). The Board noted that the Respondent's disciplinary policies remained unchanged, but the Respondent exercised some discretion in applying those policies. Discipline was meted out in the context of a five-step progressive disciplinary system, which predated the Union's selection as collective bargaining representative, and there was no significant deviation in discipline before and after this event. The framework of the progressive discipline system circumscribed the Respondent's exercise of discretion as it disciplined employees. The Board found that the Respondent did not violate Section 8(a)(5) by failing to notify the Union and bargain with it before issuing specific discipline to particular individuals. The Board relied on Fresno Bee, 337 NLRB 1161 (2002). The Board noted that Fresno Bee issued after Washoe Medical Center but that the two cases were not irreconcilable. In Washoe Medical Center, the Union had not requested before-the-fact bargaining with regard to impositions of disciplinary actions, and the footnote addressing this issue stated a necessary, but not sufficient, condition for finding the violation alleged there. The Board also adopted the judge's finding that the Respondent, by engaging in the conduct at issue, did not discriminate in violation of Section 8(a)(3).

The Board remanded the allegation that the Respondent violated Section 8(a)(5) by more strictly enforcing its efficiency standards for inspectors. The Board noted that the record showed that the 80 percent minimum efficiency standard and the sanctions for failing to meet that standard remained essentially unchanged after the election. The Board also noted that there is at least a question as to whether the Respondent's enforcement of the efficiency standard became

more stringent. The Board further noted that a violation of Section 8(a)(5) would be established, on remand, if the evidence actually proved (1) the existence of a preelection established past practice of permitting inspectors to avoid additional discipline by gradually improving their performance over time; (2) a postelection change to the practice that removed the opportunity to avoid additional discipline through graduated improvement; and (3) the change to the past practice constituted a material and substantial change in employees' terms and conditions of employment.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Longshore and Warehouse, Local 6; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Oakland, Feb. 20-23; 26-28, and March 19, 2001. Adm. Law Judge Burton Litvack issued his decision April 19, 2009.

Electrical Workers Local 42 (Henkels & McCoy, Inc.) (1-CD-1074; 354 NLRB No. 78)
Blue Bell, PA, Sept. 23, 2009. In this proceeding under Section 10(k) of the Act the Board found reasonable cause to believe that IBEW Local 42 had violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with the object of forcing the Employer to assign work related to the installation of a fiber optic communication network along Interstate 91 in western Massachusetts to employees it represents rather than to employees represented by the Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO (Laborers), and that there were competing claims for the work. Thus, the Board denied the Laborers' request to squash the notice of hearing, rejecting the Laborers' claims that: (1) the threat by IBEW Local 42 was a sham; (2) the Employer was trying to create a jurisdictional dispute to avoid its contractual wage rate obligations to the Laborers (the Board distinguished the dispute here from that in Recon Refractory & Construction, Inc. v. NLRB, 424 F.3d 980 (9th Cir. 2005); and (3) unless the Board declined jurisdiction it ran the risk of effectively preventing Massachusetts from establishing the prevailing wage rate for the work in dispute, and potentially raising constitutional questions. [HTML] [PDF]

The Board concluded that the employees represented by IBEW Local 42 are entitled to perform the work in dispute, relying on the factors of collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations.

(Chairman Liebman and Member Schaumber participated.)

Long Island Head Start Child Development Services, Inc. (29-CA-26343; 354 NLRB No. 82) Patchogue, NY, Sept. 25, 2009. Upon remand from the United States Court of Appeals for the Second Circuit, the Board reversed its prior decision, reported at 345 NLRB 973 (2005), and found that the Respondent's unilateral changes of insurance carrier and plan were lawful under

the Act. In its earlier decision, the Board had found that the parties, by commencing negotiations for a successor collective-bargaining agreement, waived the contractually-required notice of intent to terminate or modify the agreement and therefore forestalled automatic renewal. The Board had concluded that the management-rights provision permitting the Respondent's unilateral change had expired prior to the Respondent's action and that the changes violated Section 8(a)(1) and (5). The court, however, found that the precedent on which the Board relied held only that bargaining forestalled automatic renewal when the contractually-required notice was untimely or improper in form and did not apply when, as in this case, the notice was lacking entirely. The court remanded, finding that the Board had not adequately explained a rationale for extending the precedent to such circumstances. [HTML] [PDF]

The Board accepted the court's decision as the law of the case. Through an invitation to file briefs, the Board provided the parties and interested amici an opportunity to address the legal issue of whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice. Neither the General Counsel nor the Charging Party addressed the questions detailed in the invitation to file briefs, and the Board therefore declined to resolve them in this proceeding. Instead, the General Counsel proffered an alternative rationale that relied on a determination that the parties' contract had expired at the end of its initial term, well before the events of this case. The Board rejected this assertion as contrary to the court's findings. The General Counsel also asserted that the provisions of a Memorandum of Agreement executed by the parties demonstrated their mutual intent that the contract would expire before the date of the Respondent's unilateral changes. The Board, however, found that the cited provisions were insufficient to warrant the inference urged by the General Counsel. Based on the law of the case and the General Counsel and Charging Party's failure to propose a theory consistent with it, the Board concluded that the parties' agreement, including its management-rights provision, remained in effect at the time of the Respondent's changes and that the Respondent lawfully exercised its discretion under the contract. Therefore, the Board dismissed the complaint.

(Chairman Liebman and Member Schaumber participated.)

Milwaukee City Center, LLC (30-UC-419; 354 NLRB No. 77) Milwaukee, WI, Sept. 21, 2009. The Board, reversing the Regional Director, found that under the standard set forth in Safeway Stores, 256 NLRB 918 (1981), the Employer's employees who work as baristas and head baristas at a franchise Starbucks coffee shop located in the Employer's hotel cannot be accreted to the existing bargaining unit of food, beverage, and other hotel employees. In reversing the Regional Director, the Board particularly relied on the "critical" factors of lack of interchange and common day-to-day supervision between the Employer's Starbucks employees and the hotel food and beverage employees. Frontier Telephone of Rochester, 344 NLRB 1270, 1271 and fn. 7 (2003) ("the two most important factors'—indeed, the two factors that have been identified as 'critical' to an accretion finding—are employee interchange and common day-to-day supervision," and therefore "the absence of these two factors will ordinarily defeat a claim of

lawful recognition"). The Board also found, contrary to the Regional Director, that the absence of functional integration between the Starbucks coffee shop and the Employer's other establishments, and the minimal contact between the Starbucks employees and hotel food and beverage employees, also weigh against accretion. Further, the Board found that the Starbucks Corporation exerts significant control over the baristas' terms and conditions of employment due to the requirements of the franchise relationship. Chairman Liebman and Member Schaumber agreed that the centralized control over management and labor relations, many common terms and conditions of employment, geographic proximity, similar skills and functions, and bargaining history, all relied on by the Regional Director, do not outweigh the countervailing factors (particularly lack of interchange and common day-to-day supervision), notwithstanding their separate positions regarding skills and training and bargaining history. Chairman Liebman found, in agreement with the Regional Director, that the similarity of skills and training of the Starbucks and unit employees and the parties' bargaining history in fact do weigh in favor of a finding of accretion, while Member Schaumber found that their skills and training do not significantly favor a finding of accretion and that the collective-bargaining history does not favor a finding of accretion. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Quickway Transportation, Inc. (5-CA-33111, et al.; 354 NLRB No. 80) Landover, MD, Sept. 24, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by unlawfully engaging in surveillance of its drivers because of their union activities, by creating the impression that employee Kenneth Tucker's union activities were under surveillance and informing him that he should not serve as a middleman between employees and management, and by twice interrogating employee Kevin Cook about his union activities. [HTML] [PDF]

The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3) by refusing to reinstate former unfair labor practice strikers, and by engaging in a retaliatory lockout of unit employees. However, the Board reversed on due process grounds the judge's finding that Respondent's discharge of Angelo Jackson violated Section 8(a)(3). The Board noted that at the close of the General Counsel's case in chief, the General Counsel stated that he was withdrawing the allegation governing Jackson's discharge, assured the Respondent that allegations of discriminatory conduct concerning that discharge would be deleted from the complaint, and assured the judge that he was withdrawing all the allegations with respect to Jackson's discharge. In response, the Respondent then clarified that it was limiting its case in chief to the remaining complaint allegations. The Board found that the General Counsel thereby expressly withdrew the complaint allegations concerning Jackson's discharge. Accordingly, the Board then found that the judge's finding of a discharge violation, based on a different legal theory and contrary to the General Counsel's representations at the hearing, deprived the Respondent of due process rights. The Board cited *New York Post*, 353 NLRB No. 30, slip op. at 2-3 (2008).

Finally, the Board adopted the judge's findings that the Respondent violated Section 8(a)(5) by dealing directly with employee Roger Branch about changing his employment status from that of a company driver to an owner-operator, and by transferring unit work to owner-operators without bargaining with the Union. Concerning the latter violation, the Board first noted that the bargaining unit was adversely affected when the Respondent hired the owneroperators. The Respondent utilized owner-operators interchangeably with the bargaining unit's company drivers. This created a new, full-time group of drivers competing with the company drivers for the same work, thereby constraining the work opportunities available to the bargaining unit. The Board cited Spurlino Materials, 353 NLRB No. 125, slip op. at 22 (2009). Second, the Board noted that the Respondent's decision to hire the owner-operators was motivated, at least in part, by labor costs. It was therefore amenable to collective bargaining and was not a core managerial decision beyond the reach of bargaining. The Respondent did not use the owner-operators with their sleeper cabs exclusively for the new runs requiring layovers. The Respondent interchangeably assigned owner-operators and company drivers to the same schedules and to local runs requiring no layovers. Initially, the Respondent promised the Union that if it obtained new layover work, the Respondent would come to the Union to compare the costs of using company drivers with those of owner-operators. However, the Respondent presented the Union with a minimal cost differential, many factors of which would have been amenable to collective bargaining. Moreover, two of the owner-operators that the Respondent hired for layover runs did not have sleeper cabs. The Board found that these factors rendered inconsistent the Respondent's position that an agreement for company drivers to take the layover runs was not amenable to bargaining with the Union. The Board cited San Luis Trucking, 352 NLRB 211, 230 (2008).

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Teamsters Local 639; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Washington, Oct. 3-5, Nov. 26-30, and Dec. 3-5, 2007. Adm. Law Judge Eric M. Fine issued his decision Sept. 12, 2008.

DECISIONS OF ADMINISTRATIVE LAW JUDGES

Satellite Services, Inc. (Machinists District Lodge 725) Riverside, CA, Sept. 23, 2009, 21-CA-38670, JD(SF)-34-09, Judge Lana Parke

Bashas', Inc., d/b/a Bashas' Food City, and A.J.'s Fine Foods (Food & Commercial Workers Local 99) Phoenix, AZ, Sept. 24, 2009, 28-CA-21435, et al., JD(SF)-29-09, Judge William L. Schmidt

Urban Homesteading Assistance Board Sterling Street Housing Development Fund Corp. and Del-Mar Management Services, Inc., a joint Employer (an Individual) Brooklyn, NY, Sept. 24, 2009, 29-CA-29122, JD(NY)-35-09, Judge Steven Fish

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Global Sign Industries, LLC (Sheet Metal Workers Local 19) (4-CA-35947, 36062, 354 NLRB No. 81) Tullytown, PA, Sept. 25, 2009. [HTML] [PDF]

UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Members Building Maintenance, LTD, Dallas/Fort Worth, TX, 16-RC-10879, Sept. 25, 2009 (Chairman Liebman and Member Schaumber)

DECISION, DIRECTION [Regional Director is to open and count ballots], AND ORDER [remanding proceeding to Regional Director for further appropriate action]

Triton Sprinkler Co., Inc., Atlanta, GA, 10-RC-15725, Sept. 23, 2009 (Chairman Liebman and Member Schaumber)

(In the following case, the Board adopted Report of Hearing Officer in the absence of exceptions)

DECISION, ORDER [setting aside election conducted on May 28, 2009], AND DIRECTION OF SECOND ELECTION

Canada Dry Distributing Co. of Wilmington, Salisbury, MD, 5-RC-16311, Sept. 21, 2009

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) of Regional Directors)

United Conveyor Supply Co., Melrose Park, IL, 13-RC-21859, Sept. 22, 2009 (Chairman Liebman and Member Schaumber) [also denying Employer's request for stay of election]

Pitney Bowes Government Solutions, Inc., Aurora, CO, 27-RC-8563, Sept. 24, 2009 (Chairman Liebman and Member Schaumber)
